



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18437/2015

THE IMMIGRATION ACTS

Heard at Field House
On 5 May 2017

Decision & Reasons Promulgated
On 10 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NUCHJAREE NUPONGTHAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr T. Melvin, Home Office Presenting Officer
For the Respondent: Mr M Hossain, instructed by SG Law Solicitors

DECISION AND REASONS

1. By my decision promulgated on 28 March 2017 (appended to this decision), I set aside the decision of the First-tier Tribunal ("FtT"). I hereby remake the decision of the FtT.

2. The respondent (hereinafter “the claimant”) is a citizen of Thailand born on July 1972 who entered the UK in September 2010 as a Tier 2 General Migrant. In March 2013 she began living with a partner and on 29 January 2015 applied for leave to remain on the basis of her private and family life in the UK.
3. The factual background, which has changed in the intervening period since the Secretary of State refused the claimant’s application, is not contentious. Having considered the written evidence as well as the oral evidence of the claimant and her husband at the hearing before me, I make the following findings of fact:
 - a) The claimant has been in the UK unlawfully since 2013, when her leave to remain as a Tier 2 General Migrant ceased.
 - b) In 2012 she met a Thai national who subsequently became a British citizen. They started living together in March 2013 and married on 19 April 2017.
 - c) The marriage is genuine (as acknowledged by Mr Melvin).
 - d) They have a son, born on [] 2016, who is a British citizen.
 - e) The claimant’s English language ability is limited. She took a test before coming to the UK in 2010 but has not taken one subsequently. At the hearing she communicated through an interpreter. Her evidence was that her English is better than her husband’s, which I accept. My finding, in sum, is that neither the claimant nor her husband speak English, other than at a basic level, but the claimant’s language skills are stronger than her husbands.
 - f) The claimant and her husband are culturally and linguistically connected to Thailand, where they both have family (including parents).
 - g) The claimant’s husband and child are Thai citizens as well as British citizens.
 - h) The claimant’s husband has his own Thai restaurant, from which he earns in excess of £20,000 a year, and where he has five employees.
 - i) If the claimant is removed from the UK, she will bring her son with her to Thailand, as although she would prefer him to live in the UK, her husband needs to work to maintain the family. Her husband would remain in the UK as they are concerned that if he returns with her to Thailand he will not be able to find work or earn sufficient money to support the family. She would, if returned to Thailand, seek re-entry to the UK as a spouse as soon as possible.
4. It was common ground that the claimant was unable to succeed under the Immigration Rules as at the time she made her application she was not married and had not been living with her partner for two years, which is the minimum required under GEN 1.2 of Appendix FM of the Immigration Rules.

5. It was also common ground that removal of the claimant, who has a British husband and British son, would constitute an interference with respect for family life of sufficient gravity as to potentially to engage the operation of Article 8 such that the issue to be resolved was whether removal of the claimant was proportionate.
6. The assessment of proportionality requires consideration to be given to the mandatory considerations in Section 117B of the Immigration, Nationality and Asylum Act 2002 ("the 2002 Act"). My consideration of the factors specified in Section 117B are as follows:
 - a) Section 117B(1). The first consideration is that maintenance of effective immigration control is in the public interest. I give particular weight to this consideration as the claimant has been in the UK unlawfully for several years. She justified her failure to apply before her leave expired on the basis of poor health. Whilst I accept she has had some health difficulties, these have not been of sufficient gravity to explain or justify her failure to comply with the law and do not mitigate against the weight I attach to this consideration.
 - b) Section 117B(2). The second consideration is that it is in the public interest for immigrants to speak English. The evidence before me is that the claimant has a poor command of English.
 - c) Section 117B(3). The third consideration concerns financial independence. The claimant is married to a man who has established a business and who earns over £20,000 per year. In my view, it is more likely than not that she will not be a burden on the taxpayer.
 - d) Section 117B(4) and (5). The claimant's private life and relationship with her husband were established, at best, whilst her status was precarious, and to a substantial extent whilst in the UK unlawfully. Accordingly, I attach little weight to her private and family life with her husband.

7. I now turn to consider Section 117B(6), which states that:

In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

8. The affect of Section 117B(6) on an Article 8 proportionality assessment was explained by Elias LJ in MA (Pakistan) [2016] EWCA Civ 705 as follows:

17..[T]here can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section

are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself.

...

19 In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:

(1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.

(2) Does the applicant have a genuine and subsisting parental relationship with the child?

(3) Is the child a qualifying child as defined in section 117D?

(4) Is it unreasonable to expect the child to leave the United Kingdom?

20. If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed.

9. In this appeal, it was common ground that the answer to the first question under Section 117B(6) was no and the answers to the second and third questions were yes. Accordingly, the only issue in contention in respect of Section 117B(6) was the reasonableness of expecting the claimant's son to leave the UK.
10. In MA(Pakistan) it was explained that the concept of reasonableness is not limited to a focus on the child and that it brings back into play all potentially relevant public interest considerations, including the conduct of a child's parents. See MA (Pakistan) at [88]: "*the conduct of the parents is relevant to their own situation which bears upon the wider public interest and does not amount to blaming the children even if they may be prejudiced as a result*".
11. Accordingly, the fact that the claimant has been in the UK unlawfully is relevant to the question of whether it would be unreasonable to expect her son to leave the UK.
12. However, unlike the children of the appellants in MA (Pakistan), the claimant's son is a British citizen. The Secretary of State has Guidance on the reasonableness of removing British citizen children. See paragraph 11.2.3 of the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes" dated August 2015 (which is referred to in the recent Upper Tribunal decision SF and others [2017] UKUT 120 (IAC)).
13. This Guidance makes clear that it would ordinarily be unreasonable to expect a British citizen child to leave the UK. It states that a decision to refuse to grant leave is only likely to be appropriate where the child would be able to remain in the UK and the conduct of the parent gives rise to consideration of such weight as to justify separation. The examples given are criminality and a very poor immigration history such as where there have been repeated and deliberate breaches of the Immigration Rules. Although the claimant has remained in the UK without lawful leave, she cannot properly be categorised as someone who has engaged in repeated and deliberate breaches of the Immigration Rules.

14. Accordingly, following the Secretary of State's guidance, it would be unreasonable to expect the claimant's son to leave the UK. As his removal is unreasonable, it follows that Article 8 would be infringed by the claimant being removed as Section 117B(6) stipulates that where the elements therein are satisfied there is no public interest in a person's removal. Adopting the formulation of Elias LJ in MA (Pakistan) at [20], because the answer to the first question under 117B(6) (is the claimant liable to deportation?) is no, and the answers to the other three questions (is the relationship genuine? is the child qualifying? is it unreasonable to expect the child to leave the UK?) are yes, the conclusion must be that Article 8 is infringed.

Decision

The appeal is allowed under Article 8 ECHR.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 9 May 2017